Supreme Court, U.S.
FILED

941795 MAY 1 - 1995

OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

October Term, 1994

YARDARM RESTAURANT, INC.
Petitioner,

v.

CITY OF POMPANO BEACH, FLORIDA
Respondent.

◆

Petition For a Writ of Certiorari
To the District Court of Appeal
Fourth District of Florida

◆

PETITION FOR WRIT OF CERTIORARI

◆

GALE CICERIC PAYNE
Counsel of Record
JAMES C. PILKEY
Attorneys for Petitioner
PAYNE, PILKEY & ASSOCIATES
1132 Southeast Second Avenue
Fort Lauderdale, FL 33316
(305) 761-9600

EARL FAIRCLOTH
RANDOLPH ADAMS
Of Counsel
150 Southeast 12th Street, Suite 301
Fort Lauderdale, FL 33316
(305) 525-4885

QUESTIONS PRESENTED FOR REVIEW

I. Does the Fifth Amendment require compensation to a private property owner when a 13 year period of illegitimate regulatory conduct causes foreclosure allowing a city to purchase the property at a greatly reduced price?

II. Does the *First English* allowance of temporary takings damages eliminate any cause of action under the Fifth Amendment for a permanent taking when regulatory activities, persisting over a 13 year period, cause foreclosure and loss of private property?

III. Can a state constitutionally time bar a cause of action for a permanent taking against it or its political subdivisions based on a ripeness doctrine applicable to a temporary taking?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, **Yardarm Restaurant, Inc.**, a Florida corporation and **The City of Pompano Beach, Florida**.

RULE 29.1 LISTING

Yardarm Restaurant, Inc. has no parent companies or subsidiaries.

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Petition For a Writ of Certiorari To the District Court of Appeal Fourth District of Florida

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, **Yardarm Restaurant, Inc.** respectfully requests that a Writ of Certiorari issue to review the September 9, 1994 judgment and opinion of the District Court of Appeal for the Fourth District of Florida, petition for certiorari denied by the Supreme Court of Florida, January 30, 1995.

OPINIONS BELOW

The memorandum order of the Supreme Court of Florida dated January 30, 1995 refusing to review this case is reprinted

in the Appendix at A-1.

The opinion and judgment of the District Court of Appeal Fourth District of Florida (Judges of the Fifth District sitting by designation) is reported at 641 So.2d 1377 (Fla. Dist. Ct. App. 1994), and is reprinted in the Appendix at A-2.

The opinion and judgment of the Circuit Court for the Seventeenth Judicial Circuit of Florida, Judge C. Lavon Ward presiding, entered June 6, 1991, was not reported and is reprinted in the Appendix at A-23.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the District Court of Appeal Fourth District of Florida of September 9, 1994, Petition for Certiorari denied by the Supreme Court of Florida on January 30, 1995. The Supreme Court has jurisdiction to review this case by virtue of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

STATEMENT OF THE CASE

This is a case about a company that was forced to fight City Hall in order to build a project it always had every legal right to build. It won again and again and again until it won itself into foreclosure, bankruptcy and the loss of its property. The factual chronology is largely undisputed.

In 1959, two brothers opened the Yardarm Restaurant. The restaurant was located on land overlooking the Hillsboro Inlet which leads directly to the Atlantic ocean, and provided a commanding view of the Hillsboro Inlet Lighthouse. The Yardarm sat in the middle of an existing commercial district in the City of Pompano Beach, Florida which provided for all types of high volume consumer oriented endeavors, including hotels, motels, liquor stores, bars, office buildings, theaters, auditoriums, parking lots, hospitals and much more. None of these businesses was restricted in height or density by any law of the City of Pompano.

Eventually, a 14 story condominium was built in this commercial district across the street from the restaurant. Since the condominium was considerably taller than the existing restaurant, many of its residents had a view of the Hillsboro Inlet, the lighthouse and the ocean.

The Yardarm Restaurant was noted as one of the 10 best and busiest restaurants in the State of Florida. The restaurant was so successful in this special location that the brothers conceived a plan to turn the Yardarm property into a European style grand hotel and marina. In 1972 Yardarm hired an experienced hotel architect to determine the feasibility of such

a project. Finding no height, density, zoning or any legal restrictions whatsoever, Yardarm's preliminary hotel plans were submitted to the city and approved.

The approval of this major project generated a great deal of publicity. Not all citizens of Pompano Beach were happy with the idea of the Yardarm project, particularly a few politically influential citizens who feared the project would block their view of the lighthouse and the beach. Thus began what the opinion below labels as the "sorry saga" of the Yardarm.

Bowing to political pressure, public officials vowed the project would never be built. The city refused to meet to finalize site plans until it passed an ordinance restricting building height to 10 stories. The ordinance immediately blocked the building of the hotel. Yardarm applied for a legally entitled exception and was met with more resistance in the form of building moratoriums, a change in density restrictions and an entirely different interpretation of the setback laws. The mayor of Pompano proclaimed that he would get the city commission to so restrict the setback requirements that the only thing Yardarm could build would be a "needle."

At this point the City was truly in a bind. There is no dispute on this record that there was no legal means to stop the Yardarm project and that its owners (at least through the late 1970's) had the independent financial means to build it. On the other hand, serious political pressure was being applied to stop the project. Initially, the City did the right thing.

On September 9, 1973, the mayor proposed to the City Commission passage of a referendum to purchase the Yardarm property (Tr. 1192-93, 1196). The proposal was defeated. Instead, the City took a course which both the trial court and

the opinion below found did not advance a legitimate state interest.

Yardarm eventually secured an ordinance allowing it to build the 18 story hotel and was immediately met with a lawsuit filed by a homeowner's group against the City seeking repeal of the ordinance. Because city officials declared that they hoped Pompano would lose the suit and that the City had no interest in defending this suit, Yardarm had to intervene. One and a half years later, Judge Jose Gonzalez found the ordinance to be valid.

On February 14, 1974, Yardarm received its first building permit. Four days later, the permit was revoked due to "administrative oversights." These "oversights" included such things as the plans having been submitted on the wrong color paper. They were easily remedied and Yardarm re-applied for a permit but was again refused. This time, the City claimed Yardarm needed to more than double the proposed number of parking spaces. When the City refused to budge on the parking, Yardarm was again forced to go to court.

In June of 1974, Yardarm filed a declaratory relief action. The City moved for summary judgment claiming Yardarm "failed to exhaust administrative remedies," which the trial court denied. However, the City appealed this *denial* of summary judgment. Two years after filing suit, the Court of Appeals ruled in Yardarm's favor. Thus, Yardarm was finally able to proceed to trial before a visiting judge. On September 27, 1976, the trial court ordered Yardarm to be given a permit upon presentation of plans in compliance with building and zoning laws existing on February 14, 1974, the date the initial permit was issued.

Now, three years and nine months after Yardarm first approached the City with its plans, it could finally reapply for a permit. Notwithstanding the court order, the City again refused to issue a permit, still claiming Yardarm needed to double its parking spaces. Litigation renewed, and on March 14, 1977 the court again found in favor of Yardarm. Yardarm's second permit was issued the following day. In April, 1977 construction of the hotel began in earnest with the demolition of the Yardarm Restaurant, driving of pilings and construction of a seawall.

Less than two months after the second permit was issued, more trouble arose. Unlike the initial permit, the second permit did not include approval for the dock and marina which were an integral part of the Yardarm project. After another year and another trial, the City agreed to an order allowing the docks to be built. This order required the City to provide any written assurances required by the Corps of Engineers. Instead, the City wrote the Corps of Engineers demanding that the dock permit be denied.

While the parties were fighting this issue, the City again revoked the building permit claiming insufficient work was being done. Despite the prior court order that Yardarm's permit was to be judged by standards in place on February 14, 1974, this third revocation was based on 1979 rules. The local zoning board ordered the City to reinstate the permit. The City refused and instituted a lawsuit. The trial court ruled in Yardarm's favor and the City appealed. While this litigation was ongoing the City Manager commanded that no work could be done on the property until all subsequent appeals were decided.

Once again, the appellate court ruled in Yardarm's favor. Thus, on July 16, 1981, after a further delay of two years, the

permit was reissued for a third time. Due to unprecedented inflation and increases in building costs specifically during the 1978-1981 period, the cost of the project nearly quadrupled. Yardarm was forced to reorganize the project and seek outside institutional financing.

Along with the need for institutional lenders came rules, requirements and guidelines, such as size of the project, size of the land, per room costs, affiliation with national hotel chains, management agreements, and myriad other issues which Yardarm did not have to address when it was still capable of financing the project itself. For example, Yardarm brought in Mr. Stanley Graves as "project manager." Mr. Graves was project manager for Disney World and described as the best in the United States.

When Mr. Graves began with the Yardarm he described the project as a "slam dunk." Comparing the Yardarm with his many other projects, including the initial Disney hotels, Graves found everything was positive except for the lack of support from the City. Other witnesses described the Yardarm property as the most magnificent site for a hotel in North America.

Yardarm began an international effort to find financing. To make the project a more normal lending situation Yardarm acquired another piece of land directly across the street from its original property. It paid for this acquisition and funded fees for construction, architecture and consultants by mortgaging the original parcel which it owned outright. Despite its international efforts, Yardarm found it impossible to obtain appropriate financing. The trial court specifically found that Yardarm's inability to find financing was a direct result of the City's activities.

During this period, Yardarm's plan was to do as much work as possible to keep its permit alive while seeking permanent financing. The City visited the project virtually every day and continued making demands for changes. Despite Yardarm's attempt to keep the project alive by using the proceeds from its mortgages on the property, the City again deemed work progress insufficient and on May 1, 1985, revoked the building permit for the third and *final* time. The letter of revocation gave Yardarm until October 30, 1985 (180 days) to refile its plans. Yardarm refiled its plans on time, but the City ignored them. In addition, the City Commission voted to strip Yardarm of its 18 story zoning. Faced with this dilemma, Yardarm filed suit to enjoin the commissioners from meeting a second time to finalize the zoning repeal. The trial court granted this relief, but was later reversed on appeal.

At this juncture, Yardarm had invested nearly $6 million in building the hotel project. However, with its permit gone and its zoning at risk, Yardarm suffered a well publicized foreclosure of its property and bankruptcy. No one bid at the foreclosure sale where the property reverted to the Resolution Trust Corporation which in turn sold it to the City of Pompano for $3.75 million. Thus 14 years after its initial plans were approved, the City of Pompano finally succeeded in killing the Yardarm project. Today, the Yardarm site is a city park.

On September 15, 1987, Yardarm Restaurant, Inc. sued Pompano alleging, *inter alia*, inverse condemnation under the Fifth Amendment and a violation of 42 U.S.C. §1983. Claiming the §1983 action to be premature, the City moved for summary judgment which was granted by the trial court. The case proceeded to a bifurcated trial on the inverse condemnation claim (liability only) which lasted 11 days.

In a lengthy opinion, the trial court ruled in favor of Yardarm finding that a permanent taking occurred on October 30, 1985 when the last permit revocation became final. It also held that since Yardarm's interference did not advance a legitimate state interest, it was not necessary to demonstrate loss of all use of property, but even if such a loss was required, all use was denied. Further, the trial court determined that even assuming there was a statute of limitations for inverse condemnation claims in the State of Florida, the statute could not have run in this case.

The City appealed to the Fourth District Court of Appeals. Eighteen months after briefing and oral argument were completed, the Florida Supreme Court *sua sponte* reassigned the case to three particular judges sitting in the Fifth District. Supplemental briefs and further oral arguments were required.

On September 9, 1994, over three years after the trial court opinion, the Fifth District Judges, sitting by designation as Fourth District judges, reversed the trial court finding that due to an alleged change in the law during the pendency of the appeal, there could be no permanent taking even though the City's regulatory interference did not advance legitimate state interests. Rather, the court found Yardarm's exclusive remedy to be a §1983 claim and remanded the case for purposes of considering that claim.

The opinion below also found no taking because Yardarm was not denied all use of its property since it remained free to put other projects on the land, and because the land itself still retained value. Finally, the court time barred the inverse condemnation claim before it became ripe under federal or Florida law by finding that, if there was a taking, it occurred on July 16, 1981 when Yardarm's third permit was *issued*, and not

when that permit was revoked in 1985.

In reaching these conclusions, the opinion below rejects the trial court holding that all beneficial use of the property was denied; the record evidence that the City would not have allowed any other project to be built; and the record evidence that no other project would have been economically feasible. The opinion below also fails to explain why switching to another use after expending $6 million for a hotel is economically viable or how a property which it claimed to be worth $8 million just prior to foreclosure was able to be purchased for less than half of that amount by the City of Pompano.

Yardarm filed a Petition for Certiorari in the Supreme Court of Florida. That petition was denied on January 30, 1995.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO DISSOLVE REIGNING NATIONAL CONFUSION ON THE INTERPLAY OF TEMPORARY V. PERMANENT TAKINGS.

This Petition invites the Court to map previously travelled but still uncharted areas of regulatory takings law. In recent years, this Court has taken several cases for the purposes of answering the constitutional questions posed by this case. The questions often went unanswered due to problems such as lack of ripeness. No such problem is present here. Further, this case

presents a unique opportunity for the court to delineate standards as the states attempt to comply with, or (arguably) avoid, the dictates of First English and its progeny.

A. Do Regulations Which Fail To Advance Legitimate State Interests But Do Not Deprive Substantially All Economic, Beneficial Or Productive Use Of Private Property Require Compensation Under The Fifth Amendment?

The initial question is whether the Fifth Amendment requires just compensation for regulations which fail to substantially advance legitimate state interests, even if they do not deny substantially all use of property. The Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987) and *Dolan v. Tigard*, __ U. S. __, 114 S. Ct. 2309 (1994), appear to answer the question affirmatively by virtue of their holdings. But, a major issue in this case was not squarely presented therein.

The same question presented here was squarely presented in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U. S. 172, 185 (1985), but left unanswered due to ripeness problems. The unanswered question was whether a regulation viewed as violative of the Fourteenth Amendment's Due Process Clause "because it is an attempt by government to use its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be effected only through the power of eminent domain ... need not be remedied by 'just compensation.' " *Id.*, at 185. The court found that question "must be left for another day." *Id.* This question is squarely

presented today. The opinion below specifically answers this question in the affirmative.

Both *Nollan* and *Dolan* found, at least preliminarily, that the regulatory permits conditioned on easements failed to advance a legitimate state interest and could constitute a taking requiring just compensation even though economically beneficial use of the property remained intact. The majority opinion in *Nollan* recognized that, "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former substantially advance the later." *Id.*, at 834. The majority decision believed the standards to be different from those applied to due process or equal protection claims. The dissent (Justice Brennan) claims them to be the same. *Id.*, at 834, n.3.

Dolan went one step further establishing a two-prong evaluation in this area: (1) Whether the "essential nexus" exists between the "legitimate state interest" and the regulation; and (2) if so, whether the degree of the regulation is "roughly proportional" to the projected impact of the proposed development.

The second half of this bifurcated evaluation appears to dispel the notion that a police power regulation not enacted in furtherance of valid public purpose may not confer a "public use" and thus may not trigger just compensation under the Fifth Amendment as opposed to damages under 42 U.S.C. §1983 for a Fourteenth Amendment due process violation. *See e.g.* Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U. S. 621, 656, n.23 (1981).

Under its facts *Dolan* could not specifically reach this question, however, the decision below expressly holds that:

> The lower court incorrectly ruled that a judgment for inverse condemnation could be had, even in the absence of a deprivation of substantially all use of Yardarm's property, if Pompano Beach's interference with Yardarm's plan for development were an invalid exercise of its police power.
>
> ***
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> Here, the lower court determined that the City's actions were 'illegal,' 'arbitrary and capricious,' 'not taken to promote the public's health, safety or welfare,' 'frivolous,' 'dilatory' and a 'usurpation of authority.'

Pompano Beach v. Yardarm Restaurant, Inc., 641 So. 2d 1377, 1384-85 (Fla. Dist. Ct. App. 1994). Essentially, this opinion holds that because the City's conduct was so bad the Fifth Amendment may be ignored. *Compare Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980) ("the Taking Clause of the Fifth Amendment ... stands as a shield against the arbitrary use of governmental power.") Thus, the lower court exterminates any Fifth Amendment remedy for governmental regulations which fail to advance a legitimate state interest.

The opinion below admits that regulatory takings law is "one of the most confused areas in American Jurisprudence," *Id.*, at 1384, and blames this Court. The culprit for this confusion, says the lower court, is language used loosely in this Court's decisions in *Agins v. Tiburon*, 447 U. S. 255, 260 (1980); *Nectow v. Cambridge*, 277 U. S. 183 (1928); *Penn*

Central Transportation Co. v. New York, 438 U. S. 104, 123 (1978); and *Nollan*, 483 U. S. at 834, n.3. *Yardarm*, 641 So.2d, at 1384, n. 9.

From *Penn Central* to *Lucas v. South Carolina*, __ U. S. __, 112 S. Ct. 2886 (1992), and at present, the test requiring just compensation for a Fifth Amendment regulatory taking has remained constant: "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*.'" *Id.*, at 2893-94 (citing *Agins*) This test specifically laid out in the disjunctive has weathered the trial of time. It has been cited, but in fairness not necessarily analyzed, in virtually every decision of this Court while grappling with a regulatory takings issue.

The *Nollan* regulation (permit for construction of ocean front residence conditioned on a public easement across portion of property) exceeded the "outer limits of legitimate state interests" and, as such, constituted "an out-and-out plan of extortion." *Id.*, 483 U. S., at 837. The same held true for the *Dolan* permit to double the size of a commercial store and pave a parking lot conditioned on an easement. Although both advanced legitimate governmental goals of unblocking ocean views to the public, preventing flooding and reducing traffic congestion, neither regulation passed constitutional muster. The disproportionate degree of the regulation to the impact of the proposed development flunked the "legitimate state interest" prong of this disjunctive test triggering the taking feature of the Fifth Amendment. In sum, the Court required compensation for both regulations which exceeded "legitimate state interests" even though the economically beneficial use of the property was preserved.

However, Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), did not stop his analysis after finding that the regulation reviewed (the Kohler Act) failed to advance a legitimate state purpose but delved into a deprivation of use inquiry. Thus, there is arguably conflict between *Nollan* and *Dolan* and its jurisdictional ancestors on this issue which could be resolved here.

As an alternative basis for its ruling, the lower court finds no taking because there was no "deprivation of substantially all economic, beneficial or productive use of the property." *Yardarm*, 641 So.2d, at 1385.[1] This Court has devoted most of its analysis in the area of regulatory takings to the deprivation of economically beneficial use of land. *Penn Central*, 483 U. S., at 104; *Agins*, 447 U. S., at 225; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987); *Lucas*, __ U. S. __, 112 S. Ct., at 2886. No case, to date, from this Court has posed or answered the specific question of whether the failure to advance a legitimate state interest, by itself, will suffice to compel an award of damages for a taking. This case presents the opportunity to do so.

B. Does *First English* Abolish Permanent Regulatory Takings.

The jurisprudence over the last couple of decades generated in regulatory takings cases focused on the remedial

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[1]The trial court after considering all the evidence at trial and relying on cases from this Court determined that, "While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm, in fact, was denied all use of its property." *Yardarm*, 641 So.2d, at 1383. (A-37). The appellate court reweighed the evidence and reached a different conclusion.

aspects of takings, e.g. whether the remedy was simply to invalidate an offending regulation as a substitution for compensation. This topic was raised from 1980-1987 without decision. *Agins*, 447 U. S., at 263; *San Diego Gas*, 450 U. S., at 630; *Williamson*, 473 U. S., at 185; and *MacDonald, Sommer & Frates v. Yolo County*, 477 U. S. 340, 348 (1986).

The dissenting opinion of Justice Brennan in *San Diego Gas* discussed the merits of this question and recognized that, "Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken." *Id.*, 450 U. S., at 655. He further observed that, "Invalidation hardly prevents subsequent unconstitutional regulations by the government entity," allowing it to simply amend the offending regulation and start anew, and so on, theoretically *ad infinitum*. *Id.*, 450 U. S., at 655, n.2.

The resolution of this remedial controversy culminated in *First English*, 482 U. S. 304 (1987). Although *First English* dealt with a regulation which was considered to advance a legitimate state interest, it nevertheless reaffirmed the government's right to abandon its intrusion, discontinue its regulations, or acquiesce in a judicial pronouncement that its regulation is unlawful. Given this, the Court warned that "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." *Id.*, 482 U. S.,at 317.

This petition seeks review to address the other side of this coin tossed in *First English*: The government's right under the Just Compensation Clause to insist that a permanent taking be deemed a temporary taking. Stated differently, does *First English* and its progeny bar a permanent taking where land-use

regulations, repeatedly judicially invalidated, persist, causing a foreclosure of the land and total loss of the fee simple interest in the property.

It falls within the government's prerogative to ward off a permanent taking and, at best, relegate it to a temporary status by completely backing off its regulatory scheme or, at the very least, shifting its regulatory gears into neutral. Thus, in theory, if the government backs off, the landowner is made whole and continues with his project, there should be no permanent taking. But the question becomes where, as here, the sovereign opts not to back off, and continues to implement the regulatory scheme, must it compensate for the permanent effects of its chosen course?

When the regulator chooses not to institute eminent domain proceedings, but instead elects to place a heavy governmental thumb on the head of one of its citizens causing a complete loss of property by foreclosure, there can be nothing at all temporary about the nature of the taking. For example, in the instant case, Pompano decided against condemnation proceeding because of the huge expense in condemning one of the ten busiest restaurants in the state to convert the land to its present, not for profit, use as a City Park. It used its regulatory powers to achieve the same objective. Thus, we have the flipside of *First English*: can the government by repeated regulation convert temporary takings into permanent takings?

C. If Permanent Regulatory Takings Still Exist, Do The Standards Differ From Temporary Regulatory Takings.

Should this Court decide that the failure to advance a "legitimate state interest" cannot alone establish a taking

without some deprivation of use, then this case presents an opportunity to provide appropriate boundaries. The decision below, by eliminating "legitimate state interest" from the inverse condemnation equation focused on the offending regulations' impact on the economic use of the property. Just as *Nollan* drew the boundary on what exceeded "the outer limits of 'legitimate state interests' in the takings and land-use context," *Id.*, 483 U. S., at 837, the Court here can set the "outer limits" of denial of "economically viable use of property."[2] Of particular national importance would be a determination as to whether the degree of deprivation differs in temporary as opposed to permanent takings.

The Florida appellate decision below rationalized that, "While Yardarm's evidence may have demonstrated Pompano Beach's determined opposition to Yardarm's construction of an eighteen story hotel, there is no evidence of obstruction of any other use." *Yardarm*, 641 So.2d, at 1385-86. In other words, despite a 13 year, $6 million effort to build its hotel, Yardarm's arguable ability to build a lemonade stand precludes constitutional compensation. If the remarkable pattern of regulation pressed by this City over a twelve year period to delay and defeat a legally viable, reasonably expected and investment-backed hotel project stops short of going "too far," conceivably no scenario of regulatory interference banning an otherwise permitted use can invoke the constitutional imperative of just compensation.

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[2] This invites inquiry into the "economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations... [as well as] the character of the governmental action," *Penn Central*, 438 U. S., at 124, all of which become more obvious if not *per se* when property has been taken permanently and not merely temporarily.

This case presents a veritable wonderland for setting the analytical boundary limits in this area of law. Through it the court can address such questions as whether the complete loss of a legally authorized expectation use constitutes a taking, and whether the standards for denial of use (characterized interchangeably as "economically beneficial," "economically viable," "all," "commercially impractical", etc.) are more stringent in the context of temporary takings than for permanent ones. To exact constitutional compensation in the face of retaining the interest in land, at least theoretically, should be more difficult than where the land as well as the expectation use vested therein has been forever appropriated to the public at the expense of the individual landowner.

D. Can A State Avoid Paying Just Compensation By Deeming A Permanent Taking To Be A Series of Temporary Takings And, Thus, Ripe Before The Effects Of The Former Become Certain.

This Court has not passed upon any minimum standards for when an inverse condemnation claim can be time barred for almost 48 years - the last time being to reject a statute of limitations defense to a judgment "of just compensation for the taking of private property by the Government." *United States v. Dickinson*, 331 US. 745, 747 (1947). Almost a half century later, the complete lack of uniformity on this issue throughout the country[3] coupled with the expanding area of regulatory

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[3]For example, even in the more empirical area of "physical invasion" takings, the country is divided over how and when to time bar such claim. Charles C. Marvel, Annotation, *State Statute of Limitations Applicable To Inverse Condemnation Or Similar Proceedings By Landowner To Obtain Compensation For Direct Appropriation Of Land Without The Institution Or Conclusion Of Formal Proceedings Against Specific Owner*, 26 A.L.R. 4th 68(1983).

takings beckons an update. The question is not how many years comprise a time bar but when, at the earliest, can the clock start for Fifth Amendment purposes when a taking is effectuated over a continuous period of time. Also, of national importance is whether the clock begins to run at different times depending on if the takings claim is temporary or permanent in nature?

We know that the clock cannot begin to tick before a taking claim becomes ripe. *Williamson*, 473 U. S., at 172; *Yolo*, 477 U. S., at 340. *See also Pennell v. San Jose*, 485 U. S. 1, 10 (1988) (without a showing as to the consequences of the regulation no case is presented for a takings claim). Ripeness requires the governmental entity charged with implementing the regulations to reach a *final* decision regarding the application of the regulations to the property at issue. Finality means when "the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson*, 473 U. S., at 193.

We also know that a different set of standards will apply when the source of the taking is not a single event but a continuing process of events. As declared more than four decades ago in *Dickinson*, "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.' *Id.*, at 749. In *Dickinson*, the government caused a permanent flooding to land by constructing a dam with the purpose of raising the river level to make it more navigable. Until the "consequences of inundation have so manifested themselves that a final account may be struck," suit could be postponed. *Id.*

In the case at bar, Pompano did not physically invade Yardarm's property until it purchased the land for a song at foreclosure. Before then, Pompano continually "flooded" Yardarm's land with a barrage of regulations designed to kill the hotel project and enable the government to ultimately own the land for a portion of its actual worth. At the earliest, until the City's last revocation of Yardarm's hotel permit became final on October 30, 1985, Yardarm's taking claim lacked *Williamson* ripeness. Under *Dickinson* and *San Jose*, Yardarm was required to postpone suit until its damage/injury became certain (e.g. loss of property through foreclosure), as the fruits of the City's forbidden regulations were not yet realized.

The decision below puts another spin on this analysis by throwing the temporary versus permanent distinction into the fray. It held that, "If its property were effectively 'taken,' Yardarm was not obliged to keep suing to invalidate the City's decision ... damages were available for the 'temporary taking.' "*Yardarm*, at 1387. Aside from the fact that *First English* was not decided until approximately 6 years after the court started the statute of limitations, and two years after Yardarm's temporary taking claim was barred, this reasoning begs the question of whether permanent takings are foreclosed by *First English*. *See* Section B above.

Assuming Florida had a cause of action for temporary takings prior to *First English* (which it did not), the real question is whether a landowner *must* bring multiple cases for temporary taking each time its permit is revoked and eventually reinstated, as happened here. The question is particularly compelling when the true extent of the injury did not become complete until the total loss of the property through foreclosure. *Dickinson* says no and should be applied to regulatory takings as well as physical invasion takings. *First English* arguably

says yes, but only if the government imposing the offending regulation(s) no longer does so.

Pompano retained every opportunity to back off, stop and reverse its course of regulatory behavior against this project. It chose not to do so and instead continued to wage its regulatory war against the property. After repeatedly throwing Yardarm off the wall, at the point of a foreclosure, all the king's horses and all the king's men couldn't put Yardarm together again.

The court below would place those aggrieved by takings into a perennial "Catch 22" by foreclosing their right to sue until finality and consequential injury are achieved, but then time barring a claim once ripe because it's too late. As announced in *Dickinson*, "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' - when they are born, whether they proliferate, and when they die." *Id.*, at 748. As the trial court in this case succinctly stated, Yardarm was denied the right to be "dealt with fairly by his government," - precisely what the Fifth Amendment guarantees but the lower court deprives.

If the decision below goes unreviewed it will mean that regulatory stubbornness causing five reviews by the City's building department, three proclamations from the County Board of Rules and Appeals, a Corps of Engineers' assessment, three permit revocations, seven trial court adjudications and four appellate reviews culminating in the loss of private property by foreclosure still falls short of going "too far."

Notice of the inequities of this case already extend outside the State of Florida. After digesting the opinion below, one national commentator wrote, "If ever you need an example of

outrageous pettifoggery that refuses to look at the facts as a whole and simply ignores common sense and the most rudimentary notions of equity, look no further than this opinion." Prof. Gideon Kanner, Case Digest (Ed. Note) *Just Compensation*, December, 1994, at page 5. Respectfully, even James Madison would agree.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

GALE CICERIC PAYNE
JAMES C. PILKEY
PAYNE, PILKEY & ASSOCIATES
1132 Southeast Second Avenue
Fort Lauderdale, FL 33316-1008
(305)761-9600
Attorneys for Petitioner

April 28, 1995